RICHFIELD OIL CORPORATION OF NEW YORK,
Appellant,

VS.

THE CHESAPEAKE & CURTIS BAY RAILROAD COMPANY AND THE WESTERN MARYLAND RAILWAY COMPANY,
Appellees.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1941.

GENERAL DOCKET NO. 38.

OPINION FILED JUNE 10, 1941.

PETITION AND MOTION FOR RE-ARGUMENT OF THE CHESAPEAKE & CURTIS BAY RAILROAD COMPANY AND THE WESTERN MARYLAND RAILWAY COMPANY, APPELLEES.

EUGENE S. WILLIAMS,
WILLIAM R. SEMANS,
F. NEAL PARKE,
Solicitors for Appellees.

The Daily Record Co. Print, Baltimore.

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To the Honorable, the Judges of the Court of Appeals of Maryland:

The Chesapeake and Curtis Bay Railroad Company and The Western Maryland Railway Company, appellees in the above entitled appeals, by Eugene S. Williams, William R. Semans and F. Neal Parke, their solicitors, respectfully pray your Honorable Court to grant a re-argument in the above entitled appeal in which the

opinion of your Honorable Court, holding that the decree of the Chancellor should be reversed, was filed on June 10th, 1941; and your said petitioners hereby humbly show the grounds for such motion for re-argument to be those which are now next hereinafter respectfully stated and set forth.

FIRST GROUND.

I. The material mistake or error of law in the Court's holding admissible parol testimony as to (*a*) the *intention* of the parties grantor and grantee in reference to whether an easement or fee was to pass under the deed of September 11, 1925, at the time of its execution, and as to (*b*) the legal effect of this grant; and the consideration of this parol testimony in connection with the conclusion reached by the appellate court in its construction of the deeds here in question.

The opinion of the Court (*Daily Record, June 19, 1941, cols. 3 and 4, p. 3*) contains a summary of this opinion and parol testimony and declares:

> "The chancellor admitted extrinsic evidence, over exception, as to the intention of the parties at the time this deed of September 11, 1925, was executed and we believe it was rightfully admitted."

The nature of this testimony is illustrated by this further excerpt from the opinion of Court:

> "Mr. Boyd denied that he ever made a statement about The Chesapeake and Curtis Bay Railroad Company owning in fee the land over which its tracks were placed and further stated that no fee was ever granted nor was there ever any intention of granting a fee."

It is earnestly urged that property rights in land are gravely imperiled if the meaning and effect of the instruments of writing whereby the interest and estate alone may be transferred are to be affected, limited or controlled by extensive parol testimony of the *intention* of a party with regard to the effect of an authentic and valid conveyance of the prescribed statutory requirements.

The effect of negotiations is not gathered from previous writing and conferences but from the single instrument which the law requires and the parties adopt as the embodiment of the transaction between the parties in the assignment of an interest in land. As stated by Wigmore on Evidence (2 ed.) sec. 2425:

> "When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are immaterial for the purpose of determining what are the terms of their act."

Thus, the construction of a deed is a matter of law for the court (*a*) and, in the absence of fraud, accident or mistake, parol evidence is not admissible to vary, contradict or alter terms of a deed (*b*). There is no issue on the present record of fraud, accident or mistake, and, so, the whole question is one of law for the court. In its construction, the court, if necessary, may resort to the situation of the parties and the surrounding circumstances in order to ascertain the true intention of the parties, (*c*) but this does not permit the admission of parol and extrinsic testimony of opinion and purpose, and a party's conception of the meaning and effect of a deed. *Supra.*

(*a*) Cadwalader v. Price, 111 Md. 310
Hayes v. United Rwys. & Electric Co., 124 Md. 687

Kelso v. Stigar, 75 Md. 376
Bogart v. Willis (1930) 158 Md. 393
O'Ferrall v. DeLux Sign Co. (1930) 158 Md. 544
Schwartz v. Wilmer, 90 Md. 136.

(b) Fowler v. Pendleton, 121 Md. 297
Owens v. Graetzel, 132 Atl. 265
Whitelock v. Whitelock, 156 Md. 115
Kvedera v. Mondravitzky, 145 Md. 260
Warren Glass Works Co. v. Keystone Coal Co., 65 Md. 547
Robinson Const. Co. v. Barry, 135 Md. 275
Prudential Ins. Co. v. Devoe, 98 Md. 584
Citizens Mut. Fire Ins. Co. v. Conowingo Bridge Co., 116 Md. 422
Diamond v. Shriver, 114 Md. 643
Standard Scale & Supply Co. v. Baltimore etc. Co., 136 Md. 278
Parran v. Wilson, 160 Md. 604
Powers Foundry Co. v. Miller, 166 Md. 590
James L. Kernan Co. v. Cook, 162 Md. 137
Levy, et al. v. Dundalk Co., 11 Atl. (2nd) 476
Buchwald v. Buchwald, 175 Md. 115
Gross v. Stone, 173 Md. 653.

(c) Buckner v. Hesson (1930), 159 Md. 461
Maryland State Fair v. Schmidt, 147 Md. 613
Hammond v. Hammond, 159 Md. 563
Gassinger v. Thillman, 160 Md. 194
Winter v. White, 70 Md. 305
Bowie v. Western Maryland R. R. Co., 133 Md. 1
Roberts v. Roberts, 102 Md. 131
Brown v. Reeder, 108 Md. 653
Logsden v. Brailer Mining Co., 123 Md. 113
Neavitt v. Lightner, 155 Md. 365
Marden v. Leimbach, 115 Md. 206
Maryland State Fair v. Schmidt, 147 Md. 613
Weinbeck v. Dahms, 134 Md. 464.

Should this Honorable Court, on further deliberation, hold that the parol testimony here assailed is admissible, then it is respectfully requested that it give, on re-argument, your petitioners the opportunity to analyze this parol testimony particularly in view of the circumstance that the testimony of Mr. J. Cookman Boyd, Sr., found his recollection of acts, conversations and intentions when he testified in this cause at variance and in conflict with his earlier recollection, when the events were fresher in his memory and in accord with documentary proof and the recollection of other witnesses.

In this connection, and going to the weight of this testimony, your petitioners respectfully present this summary of the pertinent and material circumstances, whose vital significance needs further presentation for a proper evaluation of the extrinsic testimony considered by the court.

Both United States Asphalt Refining Company and its then affiliate, The Chesapeake and Curtis Bay Railroad Company, grantor and grantee, respectively, in the deed of September 11, 1925, had, as their joint officer and representative in charge of the conveyance, Mr. J. Cookman Boyd, Sr.; that he was not only a director of both companies, a "kind of managing director" of the Asphalt Company, and President of the Chesapeake and Curtis Bay, but also General Counsel of both companies; that in such a situation the dual representative, in view of his peculiar knowledge and authority, speaks with a special force, tantamount to practical finality, upon the intent and purpose of the deed from the one company to the other, and that the true and legal effect of the deed can only be recognized accordingly. The petitioners further point out to your Honors that during the negotia-

tions leading to the sale of the stock of the Chesapeake and Curtis Bay to the Western Maryland, when by reason of the ambiguity of the deed the question first arose as to the title which had been conveyed, Mr. Boyd himself settled that question once and for all by his positive and unequivocal acts and deeds next briefly described:

(a) He addressed to the then President of the Western Maryland a letter wherein he stated the following:

> "It is agreed and understood that a good and merchantable title shall be given of all of its land and right of way, located at Wagners Point, Curtis Bay, Baltimore, amounting to fifteen (15) Acres, more or less, but only all its right, title and interest in and to the tracks and right of way on the strip of land set aside for railroad purposes running from First Avenue easterly and southerly along the boundary line of the land owned by the Texas Oil Company there situate." (R. 62).

This letter was acknowledged by Mr. George P. Bagby, then chief legal officer of the Western Maryland, wherein the offer of sale was accepted on the above quoted terms (R. 64).

(b) Thereafter, Mr. Boyd executed an agreement in connection with the transaction wherein it is recited (R. 64):

> "it being understood and agreed that the Chesapeake and Curtis Bay Railroad Company has a good and merchantable title, free of all liens and encumbrances to all of its personal property and to all of its *land*, right of way and tracks * * *, amounting to 15 acres, more or less, *save and except the tracks and right of way on the strip of land set aside for railroad purposes, in and to which the Chesapeake and Curtis Bay Railroad Company claims a right, title and interest*" * * *.

(c) Then followed the hearing before the Interstate Commerce Commission on the application of the Western Maryland for authority to purchase the stock of the Chesapeake and Curtis Bay. The application was contested by other interests on the ground that the purchase price was excessive. At that hearing Mr. Boyd appeared as a principal witness in support of the sale, *still representing the community of interests composed of the Asphalt Company and the Chesapeake and Curtis Bay, grantor and grantee, respectively, and their largely identical stockholders, and on the very question of ownership testified*, in part (our Brief p. 29, et seq.):

> * * * We think the *land* we have down there is worth fully as much without the tracks themselves as we are getting for this. * * *
>
> * * * I know this: That the *land* acquired by the Chesapeake and Curtis Bay from the United States Asphalt Company was acquired at a very, very low price. * * *
>
> * * * You recall that for an expenditure as of the tracks, in addition to that of the *land*, I just stated the land was * * * sold to the road at an exceedingly small price away back in 1915; that in 1926 (1925) additional *land* was given to the road in exchange for *land;* that the property had increased, insofar as land values alone were concerned and Wagner's Point in one particular place, not 100 per cent but 300 and 400 per cent. * * *
>
> * * * Therefore it is very, very difficult to arrive at exact values about that, but I do say * * * that the 15 acres of *ground* alone outside of the trackage are worth very much more than the $325,000.
>
> * * * We had the *land*. * * * The *land* itself increased. When we came to sell that, then we took into consideration the increased value of the *land*.
>
> * * * There was an exchange between the Railroad Company and the Asphalt Company in 1925,

> * * * by which we acquired by giving over *land* that would be useful to them other *land* that would be useful to us. In other words, we gave back *lands* that might be utilized by the company for *lands* that were not usable for railroad purposes."

The petitioners respectfully maintain that the foregoing testimony of the executive officer and legal representative of the respective parties to the deed cannot be construed to mean other than what it states in plain, unmistakable language; that it does not stand to reason that one of Mr. Boyd's legal and business experience could and would, in testifying on the issue of the value of the property, repeatedly and insistently assert that the Chesapeake and Curtis Bay owned the *land*, without meaning that it owned the *land*, as distinguished from an easement; nor can any other conclusion be rationally drawn than that Mr. Boyd's most manifest purpose, as spokesman and directing agent for the inter-related grantor and grantee, both in the actual conveyancing and in the subsequent explaining and interpreting of that conveyancing, was to satisfy and assure the Interstate Commerce Commission and the Western Maryland, by his emphatic testimony and by the above mentioned documents, that the Asphalt Company had positively conveyed the actual land—that is, the fee,—to the Chesapeake and Curtis Bay by the deed of September 11, 1925. Surely no stronger proof could be desired from the surrounding facts and circumstances.

Your petitioners further respectfully assert that under principles of law firmly established by this Court, the words and acts of Mr. Boyd, specifically directed to the question of the character of title that had been conveyed by the one company—of which he was part and for which he had acted in the conveyancing and was then acting—to the other company—of which he was part and

for which he had acted in the conveyancing and was then acting—for the purpose of proving and establishing once and for all the effect of such conveyancing, carry the strongest possible significance, and that, in view of his peculiar knowledge and authority are, in absence of incontrovertible evidence to the contrary, determinative of the intent, purpose and effect of the deed, if extrinsic evidence is to be considered.

SECOND GROUND.

II. The material mistake of error of law in the court's construction of the effect of the grants in controversy in holding that by these grants:

A. That the Chesapeake and Curtis Bay Railroad Company had a mere easement in the parcels conveyed to it; and that this easement was subject to the right of the Richfield Oil Corporation of New York of crossing or recrossing over, or in placing its pipe lines, connections or other equipment necessary and proper to the operation and enjoyment of the appellant's property across and under the right of way of the Chesapeake and Curtis Bay Railroad Company located on the property owned by the Richfield Oil Corporation of New York in fee, provided, however, that this be performed by the latter company in such manner and at such times as not to interfere with or interrupt the reasonable and proper use of the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company of said rights of way for railroad purposes. (Opinion, Daily Record, col. 6, p. 3, June 19, 1941).

B. That the Richfield Oil Corporation of New York had any title in fee or in reversion in and to the land occupied and enjoyed by the Chesapeake and Curtis Bay Railroad Company.

C. The decision is without precedent. Counsel for appellant has submitted none, nor has the search of counsel for appellees found its counterpart. While the Railroad Company runs through the property of the Richfield Oil Corporation, its original location as an industrial railway was the self-serving choice of the owner of the traversed land, the predecessor in title of the Richfield Oil Corporation; and the continued use and service of the Railroad Company have been employed in the transportation service of the Richfield Oil Corporation and the former corporate owners from which it derived its title and plant. The location of the Railroad Company's roadbed, tracks, yards and buildings did not deprive the successive owners of the tract with access to the land on opposite sides of the railway property. Such access was afforded by a public highway running, east and west, midway through the entire property, and by numerous private ways crossing the railway line as shown by the plats. This is all the law requires and the owners may exact no more.

The Railroad Company has *permitted* the Richfield Company to put underground pipe lines across its right of way for intra-corporate property use and service. *Permission*, however, is not a *right*. In fact, the gift of such *permission* carries the implicit recognition by its recipient that no *right* subsists.

Moreover, the right to pierce the Railroad's line, as conferred by the Court, is not single, but multiple and at will. The privilege created is not in the exercise of any natural usufruct of the land. The oil is not a product of the land. It is a commercial article produced by the art and labor of the appellant. The laying of the proposed pipe line is not to produce or utilize any yield of

the land, but to provide transportation by the refiner of a manufactured article for delivery to a competing railway carrier for a railway delivery to the customers of the appellant. The use is, therefore, not indigenous, but wholly artificial.

Further argument is indicated by the novelty of the case, and its dangerous incidence because of the peculiar nature of a railway right of way, which is not in law the familiar easement in land, as known to the law of real property. To guard against the dangers of railway operation and to assure the safety, security and dispatch of passenger and freight service, the railway carrier's possession is exclusive at all times. None but the carrier is charged with the duty and responsibility of the possession, care and operation of its property. So, none but the carrier should have the power, in the exercise of a reasonable discretion, to decide what extraneous use of its roadbed may be made by a third party.

A.

In the construction of a deed, it must be considered as a whole (*a*); and the intention of the parties as it appears from the whole instrument must control, giving to every word its due force; and reading in the light of existing conditions and circumstances (*b*), with terms of doubtful meaning construed most strongly against the grantors.

(*a*) Neavitt v. Lightner, 155 Md. 365
Marden v. Leimbach, 115 Md. 206
Maryland State Fair v. Schmidt, 147 Md. 613
Weinbeck v. Dahms, 134 Md. 464
Winter v. White, 70 Md. 305
Bowie v. Western Md. R. R. Co., 133 Md. 1
Roberts v. Roberts, 102 Md. 131.

(b) Campbell v. Whitehouse, 122 Md. 409, 120 A. 529
Buckner v. Hesson, 159 Md. 461
Hammond v. Hammond, 159 Md. 563
Gassinger v. Thillman, 160 Md. 194.

Furthermore, as pointed out in the opinion, Sections 11 and 12 of Article 21 of the Code provide: (Secs. 12 and 13 of Article 21 of the Code, 1939):

11. No words of inheritance shall be necessary to create an estate in fee simple, but every conveyance of real estate shall be construed to pass a fee simple estate, unless a contrary intention shall appear by express terms or be necessarily implied therein.

12. The word "grant", the phrase "bargain and sell", in a deed, or any other words purporting to transfer the whole estate of the grantor shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing, by implication, or otherwise, a different intent.

It is respectfully urged that, in the application of these rules of construction, the court acted under a misapprehension of the terms of the conveyances under review and their legal effect. For the purpose of discussion and a more convenient consideration of the successive conveyances, they are here grouped chronologically and set forth in some detail. (*The more significant and important terms and phrases have been italicized for emphasis.*)

DEEDS OF MARCH 16, 1916, AND OF JANUARY 2, 1924.

The first conveyance of the United States Asphalt Refining Company to the Chesapeake and Curtis Bay Railroad Company was on March 16, 1916 (R. 43-48). The operative clause is that the Refining Company "doth grant unto the said Chesapeake and Curtis Bay Railroad Company, its successors and assigns, *the rights of way for railroad purposes* in and to that *part* of the *lands* of the United States Asphalt Refining Company at Wagner's Point in Anne Arundel County, Maryland, and described as follows that is to say:" Then follows a description of the land conveyed by courses and distances as delineated on a plat, marked "Exhibit A" pp. 43-48 of Record. The plat shows the location of the main track of the Railroad Company with its spur lines or tracks on the land of the grantor. The main line is laid from the pier head line of Curtis Bay to the south in a northerly direction through the property of the grantor. From this main line a number of spurs or tracks extended to the east and west. The southernmost spur (Line "A") extended eastward so as to bind upon the southern and eastern boundary of The Texas Company whose product could be carried by Lines "A", "B" and "C" to the water line. The acreage conveyed was a total of 17.12 acres, and most of it, especially to the west had no trackage laid or indicated upon it. For instance, one section of about two hundred feet wide extended for approximately 1,200 feet eastwardly from the Fairfield road without any track upon it.

After the description of the nine parcels conveyed, there followed these provisions:

> "Saving and reserving however to the said the United States Asphalt Refining Company a *joint* use

in said *right of way and the tracts* (*sic, tracks*) thereon for the necessary switching and other uses for itself and its allied industries now or which may hereafter be located along said right of way * * *.

"Being a *part* of the *land* which by indentures at various times heretofore were acquired by the grantor.

"To have and to hold the said *described rights of way and the railroad tracks thereupon* unto and to the use of the said Chesapeake and Curtis Bay Railroad Company, its successors and assigns, subject however to the reserve *joint* use aforementioned.

"And the said the United States Asphalt Refining Company covenants that it will warrant specially the *property* hereby conveyed, and that it will execute such other and further assurances of the same as may be requisite." (R. 47)

A second deed of January 2, 1924, conveyed by description nine additional *parcels of land* in the same manner and terms as the deed of March 16, 1916 (R. 48-52).

Apart from the variation caused by the difference in the parcels of land described, these two deeds are identical in terms and provisions. The term right of way when used in connection with a railroad, if it is intended to be a mere easement of a right of way, that is of having railroad trains pass over the grantor's land, is necessarily an easement in gross and not an easement appurtenant. A right of way is frequently more than this easement of a mere right of way. As when it is a strip of land actually owned by the railroad company on which the tracks are located. Tiffany on Real Property (2nd Ed.) Sec. 358, p. 1250.

The estate acquired by the grants is settled by the deeds of conveyance. From the language of these deeds,

it is clear that more than a mere right of way or passage was intended to be conveyed. The grant ran to the grantee, its successors and assigns, and it was for "the rights of way for railroad purposes", in and to separately described parcels of land, whose metes and bounds were given. The plats which were filed with the deeds showed the main track and its spurs and switches as then in actual railway use and an *excess* of land beyond the mere right of way requirements. That the land conveyed was designed for something more than a railroad's right of way is thus irrefutably shown by the words of the deeds and, graphically, by the plats which were annexed and made a part of these deeds.

Furthermore, and consonant with this conclusion is the reservation in both deeds of the only right in the parcels granted which the grantor retained. This was the *joint* use in said right of way and tracks thereon for the necessary switching and other uses and purposes for itself and its allied industries now or which may hereafter be located along said right of way. The maxim *expressio unius exclusio alterius* applies. Its effect is to exclude any other reservation and to enforce the conclusion that the grants were not of a mere easement for a railroad right of way, but of the several described parcels for a designated special use, that is, for railroad purposes, including, as is manifest from context provisions and plats of the deeds when each is taken as a whole. New Mexico v. United States Trust Company, 172 U. S. 171; Arkansas Improvement Co. v. Kansas City, Southern Railway Company, 189 La. 921, 181 S. R. 445.

It follows that in holding an absolute fee did not pass by this deed, and that a mere easement of right of way, with the absolute fee on the land, remaining in the

grantor, the court did not consider the construction that the grants were of a qualified, base or determinable fee, which gave to the grantee exclusive possession and enjoyment, except, and only, as to the particular reservation made as to switching and uses for the benefit of the grantor, of the parcels of land described so long as the grantee, its successors and assigns uses these parcels for railroad purposes.

As stated by Venable:

> "The tenant of this estate has all the powers and privileges of a tenant in fee simple, and the estate has the same incidents, during its continuance as an estate in fee simple." Syllabus of Law of Property in Land, Venable (Brodie ed.) p. 13.
>
> State v. Brown, 27 N. J. L. 13.

On the 11th of September, 1925, the Chesapeake and Curtis Bay Railroad Company and the United States Asphalt Refining Company executed a third deed for the purpose of further defining and limiting their respective rights of property. The first recital sets forth the two deeds and affirms that the Refining Company had conveyed the right of way for railroad purposes and these lands "The Chesapeake and Curtis Bay Railroad Company" intended to use for the operation of the said Company, and had so used the larger part of these lands, but certain small portions had not been so used or considered necessary for use for the operation of the railroad and on the other hand certain other small portions of the contiguous land of the Refining Company may have been so used for the operation of the railroad. The deed then recites that the "land actually in the possession of the said The Chesapeake and Curtis Bay Railroad Company and used by it in the operation of its railroad has

been recently surveyed and is embraced within the description" set forth in the deed; and then the concluding recital is in these clear and precise terms:

> "And whereas it is the purpose and intention of the Deed that that *portion of said land heretofore conveyed* by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company, which has not been occupied by the said The Chesapeake and Curtis Bay Railroad Company and used by it in the operation of its railroad as aforesaid, and not embraced within this description hereinafter set out, and not delineated on the plat hereto annexed shall be *reconveyed* by the said The Chesapeake and Curtis Bay Railroad Company to the said The United States Asphalt Company, and that the lot of land hereinafter described and delineated in said plat (which embraces *part of the lot of* ground *heretofore conveyed* by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company and such other *portion* of said land of the said The United States Asphalt Refining Company used by the said The Chesapeake and Curtis Bay Railroad Company for the operation of its road as were not included in said Deeds) shall *be conveyed* by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company."

After these recitals of the factual situation with respect to the relative title and use of the land by the Railroad Company, the granting clauses of the deed follow, and are of this tenor:

> "Now therefore this deed witnesseth that for and in consideration of the premises, and of the sum of One Dollar, the said The Chesapeake and Curtis Bay Railroad Company doth grant, assign and reconvey unto the said The United States Asphalt Refining

Company, its successors and assigns, its right, title and interest in and to all that portion of land heretofore conveyed by the said The United States Asphalt Refining Company to the said the Chesapeake and Curtis Bay Railroad Company as is not embraced within the description of the lots of ground hereinafter conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company and delineated on the plat hereto annexed.

Together with all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging, or anywise appertaining.

To have and to hold the same unto and to the use of the said The United States Asphalt Refining Company, its successors and assigns, in the same manner as if the same had not heretofore been conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company."

The deed then proceeds as follows:

"And this deed further witnesseth, that for and in consideration of the premises, and of the sum of One Dollar, the said United States Asphalt Refining Company doth grant, convey and assign unto the said The Chesapeake and Curtis Bay Railroad Company, its successors and assigns, the rights of way for railroad purposes in and to the following lots or tracts of ground situate lying and being in the City of Baltimore, and described as follows, (subject, however to the reservations hereinafter set forth) to wit"

Then follows a separate description of nine parcels of land, with the heading "Parcel No. 1" to 9, both inclusive, and a sub-title "Main Track and Yards" for Parcel No. 1,

containing 8.967 acres of land, more or less; and sub-title of "Right of Way for tracks 38-47-48" for "Parcel No. 2" containing 3.510 acres of land, more or less" and a similar heading for Parcels 3 to 9, both inclusive. After these courses and distances, the deed identifies these parcels, and then concludes as here set forth:

> "Being all that portion of the lots of ground heretofore conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company by the deeds hereinbefore recited and the right of way for railroad purposes in such other land of the said The United States Asphalt Refining Company not heretofore conveyed to the said The Chesapeake and Curtis Bay Railroad Company, as is now used by the said The Chesapeake and Curtis Bay Railroad Company in the operation of its railroad as aforesaid.
>
> Together with all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging, or anywise appertaining.
>
> To have and to hold the said described right of way and the railroad tracks thereon unto and to the use of the said The Chesapeake and Curtis Bay Railroad Company, its successors and assigns, saving and reserving, however, to the said The United States Asphalt Refining Company, its successors and assigns, and to the Interocean Oil Company, a corporation duly incorporated, its successors and assigns a joint use in such parts of said right of way as may now be occupied by any tanks, stills or build ings of the said The United States Asphalt Refining Company and the said The Interocean Oil Company, now erected thereupon, and for such time as the same may remain thereupon."

There was a covenant of special warranty of the property thereby granted and a due execution and delivery

of this deed by the parties thereto. The effect of this joint deed was to reduce the quantity of land which had been previously granted the Railroad Company and correspondingly increased the acreage of the Asphalt Company.

The deed last mentioned of September 11, 1925, was made in contemplation of the sale of the entire property of the Asphalt Company to the Interocean Oil Company. The sale was closed by the deed of the Asphalt Company, dated October 5, 1925. The description adopted in the granting clause of this deed was to describe the land so as to embrace an area of 107.72 acres, more or less, and then to fix and define what was intended to be conveyed by excluding from this area the grants which had been theretofore made by the Asphalt Company to the Chesapeake and Curtis Bay Railroad Company by this reservation.

> "Saving and Excepting however, from the above described land *such portions* as is described and conveyed to the Chesapeake and Curtis Bay Railroad Company by and in a deed of exchange and in the annexed hereto made between the said United States Asphalt Refining Company and the Chesapeake and Curtis Bay Railroad Company dated September 11, 1925, with the benefit however, to the said party of the second part, its successors or assigns of the reservations mentioned in said deed of exchange relating to the joint use of such parts of the right of way of said railroad as may now be occupied by any tanks, stills or buildings therein as recited in said deed." (R. 52-53)

On even date with the above deed, the Interocean Oil Company, grantee, executed a deed of trust to the Century Trust Company of Baltimore conveying the land obtained from the Asphalt Company to secure the pay-

ment of the principal and interest of mortgage bonds to be issued by the Interocean Oil Company. In this deed of trust the above exemption is incorporated in the language here quoted.

The title of the tract conveyed, with the exception of a small portion of land immediately north of the Texas Oil Company, remained unchanged until the deed from Joseph P. Connor, Special Master, to the Richfield Oil Corporation of New York, dated October 6, 1939, conveyed with the small exception mentioned, the whole property of 104 acres owned by the Asphalt Company and later, by the Interocean Oil Company of Delaware. The property was sold and conveyed:

> "Subject also to the grant of various railroad rights of way by deed between United States Asphalt Refining Company and The Chesapeake and Curtis Bay Railroad Company dated September 11, 1925, and recorded among the Land Records of Baltimore City in Liber S. C. L. No. 4665, folio 321, said railroad rights of way being an area of approximately thirteen (13) acres of land, more or less." (R. 13-14)

There can be no doubt from this full statement of the chain of title that the deed of September 11th, 1925, is determinative of the rights and estates of the parties to this conveyance; and that the Richfield Oil Corporation of New York can have no greater estate, nor more rights than its predecessor in title, the United States Asphalt and Refining Company. Turning then to this key deed, it is clear that its primary object was to define and delimit the estates and rights of the parties with reference to their respective property rights and future ownership of the entire tract of land. The parties to the conveyance in their combined ownership united every interest

and estate in this tract, which was traversed by the Railroad Company. The conveyance which they selected as the final memorial of their respective rights and estates on the tract was drawn by skilled draughtsmen, and the intention of the parties is clearly expressed by its sole repository, and should be given effect as required by every canon of construction.

This warranty deed declares that it is the purpose and intention of the parties that the Asphalt Company convey to the Railroad Company all that lot of ground hereinafter described and delineated on said plat (*which embraces part of the lot of ground heretofore conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Company, and said other portion of said land of the said The United States Asphalt Refining Company used by the said The Chesapeake and Curtis Bay Company for the operation of its railroad as were not included in said deeds*) shall be conveyed by the said The United States Asphalt Refining Company to the said The Chesapeake and Curtis Bay Railroad Company.

Without further wearisome repetition, it is enough to say that the Railway Company simply and definitely granted to the Asphalt Company only those portions of the parcels of land which had been theretofore granted it by the Asphalt Company but which portions were not included in the description of the ground which was to be conveyed by the same instrument by the Asphalt Company to the Railroad Company.

If the Railroad Company had only an easement in these portions of land so granted, assigned and reconveyed to the Asphalt Company, a simple release of the

right of way would have been sufficient. The draughtsman was better advised. The grant was not in the form of a release of a right of way, but of a conveyance of a fee; and was followed by the clause: "Together with all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging or in anywise appertaining", which is the sufficient negation that a right of way or easement was the subject matter of the grant.

The form of conveyance by the Asphalt Company to the Railroad Company was "doth grant, convey, assign unto the said The Chesapeake and Curtis Bay Railroad Company, its successors and assigns, the rights of way for railroad purposes in and to the following lots or tracts of ground situate, lying and being in the City of Baltimore and described as follows (subject however to the reservation hereinafter set forth) to wit"

As has been stated the description is first of "Parcel No. 1—Main Tracks and Yards" and then of eight other parcels, which are at the close of the description, characterized as "Being all that portion of the lots of ground heretofore conveyed by the" Asphalt Company to the Railroad Company, "*and* the right of way for railroad purposes in such other land of the said" Asphalt Company not heretofore conveyed to the said Railroad Company as now used by the Railroad Company in the operation of its railroad as aforesaid.

Then there is incorporated the paragraph "Together with all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages to same belonging, or in anywise appertaining", which is applicable to a grant of land but not to an easement of right of way.

And then the tenendum is of the "described right of way and the railroad tracks thereon unto and to the use "of the Railroad Company, its successors and assigns, saving and reserving, however, to the said The United States Asphalt Refining Company, its successors and assigns, and to The Interocean Oil Company, a corporation duly incorporated, its successors and assigns, a *joint* use in such parts of said right of way as may now be occupied by any tanks, stills or buildings of the said The United States Asphalt Refining Company and the said The Interocean Oil Company, now erected thereupon, and for such time as the same may remain thereupon. Surely a mere easement of right of way would not have upon it such structures nor would the grantor covenant that it would warrant specially *the property* thereby granted, if only a right of way was intended to pass.

It is earnestly urged upon your Honorable Court that further consideration should be given to the contention that by the clear wording and necessary implication of the grant, the Railroad Company acquired a base, qualified or determinable fee in the parcels conveyed.

NO TITLE OF THE RICHFIELD OIL CORPORATION.

As has been seen the deed from the Asphalt Company to the Interocean Oil Company of Delaware, dated October 5, 1925, is a grant in fee simple, and first describes the outside limits of the entire area of land owned by both the Asphalt Company and the Railroad by metes and bounds, and then, from this all inclusive description of the whole area, excludes the land conveyed to the Railroad in these explicit words: "saving and excepting, however, from the above described land such por-

tions as is (sic) described and conveyed" to the Railroad in the deed of September 11, 1925, from the Asphalt Company to Railroad, "with the benefit, however," to the Asphalt Company, its successors or assigns, of the reservation mentioned in said deed relating to the joint use of such parts of the right of way of the Railroad as may now be occupied by any tanks, stills or buildings thereon as recited in said deed (R. 52-53).

In the trust indenture of the Interocean Oil Company to the Century Trust Company, dated October 5, 1925, to secure the bonds to be issued by the grantor the same description is followed. Nothing could be more evident and definite and certain that, by these exclusions of the parcels of land described in the deed of the Asphalt Company to the Railroad Company, no title to the land described in the grants to the Railroad Company passed either to the Interocean Oil Company or from the Interocean Oil Company to the Century Trust Company, or from the deed of Joseph P. Connor, as Special Master for the sale of all the property of the Interocean Oil Company which was subject to the trust deed to the Richfield Oil Corporation of New York.

It is to be observed that the exclusion from these grants is not of an incorporeal hereditament, as a right of way, but *parcels* of land as described by metes and bounds, courses and distances. First the whole tract of land is described, and from this land so described such "portions" of this *land* are saved and excepted from the grant of the Asphalt Company to the Interocean Oil Company. Even if it be conceded, that the Asphalt Company had the fee in such described portions of land, it carefully refrained from conveying this fee to the Interocean Oil Company.

One searches in vain for a scintilla of testimony that the Richfield Oil Corporation of New York has any title of any kind to the land described in the grants to the Railroad Company. A deed does not convey what it expressly saves and excepts from the grant.

In conclusion, your petitioners beg leave to call upon your Honorable Court to contemplate the consequences upon railway property rights of the decision, whose immediate effect upon the appellees is insignificant in comparison with its effect upon property throughout the State, and to afford the appellees a re-argument in order that the Court may have an opportunity of reconsidering the problems raised by the instant appeal.

Respectfully submitted,

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